MICHIGAN PROBATE JUDGES ASSOCIATION
COMMENTS ON ADM 2005-12

We understand that the proposed court rule amendments are premised on the notion that courts *routinely* grant *ex-parte* minor guardianships and/or dispense with any subsequent hearings and otherwise fail to follow statutory requirements. A statewide survey of probate judges in February, 2006, has yet to reveal where this "is a routine practice". While mistakes are possible, they can be corrected by education. The underlying premise for these amendments brings back the memory of the release of the Auditor General's Performance Audit of the probate courts which was accompanied by headlines from the Detroit Free Press proclaiming widespread abuse by conservators, announcing a state "probe" of probate courts and warning that criminal prosecutions could result. The subsequent investigation, which diverted uncounted resources from serving the public, found that the vast majority of probate courts were either in compliance with the law or had minor issues that were quickly corrected. Like the Audit, this is, at worst, an issue that can be quickly corrected.

As a general rule, minor guardianships, including temporary guardianships, are only granted if the child is not with a parent. Guardianship cannot be used to take a child away from their parent(s). The minor guardianship "reform" law of 1990 eliminated the ability of the court to appoint a guardian where "the appointment is necessary for the immediate physical well-being of the minor." The law also prohibited continuing a minor guardianship for more than one year after hearing a petition to terminate the guardianship regardless of the best interests of the minor. MPJA was able to persuade the legislature to amend the law with the passage of PA 159 of 1994, which permitted the court, under limited circumstances, to continue a guardianship for more than one year if it was in the best interests of the minor.

Temporary guardianships are limited to situations where the minor is with the petitioner and it is necessary to enroll the child in school, obtain health insurance or medical treatment. A full hearing is generally scheduled within six weeks. In those rare cases where a parent was not aware their child was no longer living in their residence or otherwise objects to the temporary guardianship, courts will schedule an immediate hearing within a matter of a few days.

The proposed amendments would make the process of protecting children, where no parent is available, more expensive and cumbersome and expose children who have been abandoned by their parents to greater risk of harm. Among other technical concerns, the proposal creates confusion as to the expiration date of the Letters of Guardianship. Currently, those letters typically have an expiration date of no more than six months from the date of qualification. It is not clear under the proposed rule if those letters would expire 28 days after qualification, or if the proof of service was not properly filed, whatever date that might be, or, some other date. Before adopting these amendments, the Michigan Probate Judges Association would respectfully request that the State Court Administrative Office first determine if there is a problem.

The proposed court rule amendments published for comment contain several flaws, are unnecessary, have negative unintended consequences, and should not be adopted. The following is a brief preliminary discussion of the primary defects identified to date:

Ex Parte Proof of Service (MCR 5.104(A)(1)

The proposed proof of service court rule amendment is overbroad. It would apply to many other ex-parte matters which are largely administrative in nature. There is no need for this particular court rule, since hearings are scheduled upon the filing of a petition for guardianship. Any service problems could be dealt with at the time of the hearing.

Personal Service on Parent(s) (MCR 5.402(C)

In many minor guardianships, the father and\or the mother are incarcerated, sometimes in another state. They could easily be located, but providing personal service would be a huge burden on the petitioner and provide no real benefit to anyone involved. It is unclear why the well established service options of MCR 5.105 (personal, mail, or publication) should be taken away for this case type. Also, this rule, as drafted, would apply to minor conservatorships as well as minor guardianships. The advantages to requiring personal service for both types of cases are unclear; the additional costs and difficulties are clear. If personal service could not be made, the ability of probate courts to protect minors could be significantly degraded.

The primary burden of this court rule would be felt by the thousands of grandparents who would have to pay process servers to serve parents who have abandoned their children without giving the grandparents a simple power of attorney.

This proposed rule amendment also conflicts with MCR 2.004, the incarcerated parties court rule. This rule establishes a mechanism by which incarcerated parents of minors may participate via telephone in a guardianship and other types of hearings involving their child. MCR 2.004 was adopted as part of a settlement agreement to resolve Cain v Department of Corrections, 88-61119-AZ, 93-15000-CM, and 96-16341-CM, litigation brought by women prisoners. Resolution of these cases occurred after years of litigation and negotiation by the parties; adoption of this proposed rule change could re-open this protracted, costly litigation for no apparent benefit.

MCR 2.004 does not mandate personal service on the incarcerated parent(s). In addition, it contains safety valve language which allows the court to act without giving the incarcerated parent the opportunity to participate via teleconference "..if the court determines that immediate action is necessary on a temporary basis to protect the minor child." MCR 2.004(F).

Letters of Guardianship Expiration Date (MCR 5.403(B)

This proposed amendment is in conflict with the Estates and Protected Individuals Code (EPIC). MCL 700.5213(3) authorizes the appointment by the Probate Court of a temporary guardian for a minor for a period of up to six (6) months. Proposed MCR 5.403(B) appears to mandate that temporary ex-parte minor guardianships could only last for 56 days after they were issued. This directive would impermissibly intrude into and abrogate Michigan law on this topic. Court rules govern practice and procedure. MCR 1.103. They may not be used to create or modify substantive law.

Also, it is unclear what type of hearing is referred to in this subsection. Is it to determine whether the temporary ex-parte guardianship should be continued? Does the hearing pertain to a full minor guardianship request?

Notice of Hearing – Temporary Minor Guardianship (MCR 5.403(B)

The current language of MCR 5.403(B) provides ample flexibility regarding the ability to dispense with notice of hearing for a minor, while being clear and easily understandable. The Court already possesses the ability to deal with the emergency situations contemplated in the amendment (i.e., law enforcement, state agency protecting minors\designated agent, etc.). Singling out these three groups for mention in the court rule would be misleading and could be easily misunderstood to mean only these entities are empowered to seek to obtain temporary guardianship. The current language is all-encompassing; it is unclear what purpose would be served by changing the language to be less inclusive. This could have the unintended effect of discouraging people from seeking temporary guardianships and actually endanger more helpless children. Also, it is important to remember that a temporary guardianship can only be granted as part of a proceeding for a guardianship. MCR 5.403(A). The minor guardianship process contains a full range of protections for the child (i.e., notice, guardian ad litem, lawyer, lawyer-guardian ad litem, notice\signature of 14-17 year old minor, etc.).

The personal service concerns are the same as those stated above regarding the proposed amendment to MCR 5.402(C).

Alternative Proposal

MCR 5.403(B) to add the following italicized words: For good cause, *stated on the record*….

MCR 5.403(D)(1) could be amended to add after the first sentence, the following:

If a temporary guardian is appointed without notice, notice of the appointment shall be sent by the court to all interested persons. The notice shall inform the interested persons of their right to contest the appointment, to have a hearing within 14 days of objecting, the process for objecting and of the date of the next hearing.

This would insure that temporary guardianships are only granted if necessary and if for good cause. By having the court give notice of the appointment, the likelihood of actual notice being given would be enhanced.